IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Roberta Karnofsky,	)	
	)	
Plaintiff,	)	C.A. No.: 2:14-cv-949-PMD
	)	
v.	)	**ORDER**
	)	
Massachusetts Mutual Life Insurance Company,	)	
	)	
Defendant.	)	
	)	

This matter is before the Court on Plaintiff's Motion to Amend/Correct her Complaint ("Motion") (ECF No. 38). For the reasons set forth herein, Plaintiff's Motion is granted in part and denied in part.

PROCEDURAL HISTORY

Defendant removed this action to this Court on March 17, 2014. As the crux of this Motion is timeliness, the Court summarizes the following relevant filings and discovery. First, Plaintiff served her Rule 26(a)(1) disclosures on April 22, 2014, in which she stated that she intended to seek consequential damages. Then, on August 8, 2014, the Court entered a Second Amended Scheduling Order (ECF No. 14). Under the terms of that scheduling order, the deadline for the parties to amend their pleadings was August 14, 2014. Next, Plaintiff proffered Dr. Randolph Waid as an expert witness in her December 15, 2014, Rule 26(a)(2) disclosures. Plaintiff then produced Dr. Waid's report on January 9, 2015. Finally, Defendant took Dr. Waid's deposition on June 2. Plaintiff filed the instant Motion on July 24. Defendant responded on August 5, and Plaintiff replied on August 12. This matter is now ripe for consideration.

LEGAL STANDARD

Rule 15(a)(2) of the Federal Rules of Civil Procedure provides that after the time to amend a pleading as a matter of course has run, "a party may amend its pleadings only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). However, where a scheduling order deadline has passed, "the [Rule 16(b)] good cause standard must [also] be satisfied to justify leave to amend the pleadings." *Nourison Rug Corp. v. Parvizian*, 535 F.3d 295, 298 (4th Cir. 2008).

DISCUSSION

Plaintiff's Motion was filed almost a year past the deadline set in the scheduling order. Accordingly, Plaintiff "'must first show good cause under Rule 16(b) before the court will consider whether an amendment is proper under Rule 15(a).'" *Nautilus Ins. Co. v. SPM Resorts, Inc.*, No. 4:13-cv-2885-BHH, 2015 WL 5781420, at *2 (D.S.C. Sept. 29, 2015) (quoting *Pure Fishing, Inc. v. Normark Corp.*, No. 3:10-cv-2140-CMC, 2012 WL 3062683, at *1–2 (D.S.C. July 26, 2012)). "Good cause exists when the moving party shows that the deadlines cannot reasonably be met despite the diligence of the party requesting the extension." *Id.* "The Rule 16(b) inquiry is less concerned with the substance of the proposed amendment and more concerned with its timeliness." *Cunney v. Patrick Commc'ns LLC*, No. JKB-13-2519, 2015 WL 6783010, at *3 (D. Md. Nov. 6, 2015). Here, Plaintiff has demonstrated good cause.

Plaintiff argues in her Motion and Reply that Defendant had notice of her claims for consequential damages and is not prejudiced by the inclusion of emotional distress and future damages in an amended complaint. The Court agrees in part. Although Defendant correctly asserts that Rule 16 applies in this case, the Court finds that Plaintiff has demonstrated diligence despite the apparent delay. It is plain to the Court that the parties have litigated this case as if

Plaintiff's claims for emotional distress and future damages were involved. Despite this Court's recent ruling that future damages are unavailable to Plaintiff as a matter of law, the Court must still address whether emotional distress damages have been adequately pled. Here, the Court finds that while Plaintiff did not explicitly allege emotional distress damages as special damages in her Amended Complaint (ECF No. 35), as required by Rule 9(g) of the FRCP, she has repeatedly demonstrated their inclusion in her claim through discovery. First, she made a general statement that she sought consequential damages in her Rule 26(a)(1) disclosures. She then clarified in her Rule 26(a)(2) disclosures that "Dr. Waid will testify regarding psychological implications of the Defendant's failure to pay disability benefits due to Dr. Karnofsky." (Pl.'s Disclosure Experts, ECF No. 19, at 2.) Next, Plaintiff produced Dr. Waid's report, in which he opined that Plaintiff suffered from emotional distress. Finally, Defendant's counsel took Dr. Waid's deposition and specifically asked whether Dr. Waid could "testify with a reasonable degree of psychological certainty that [Defendant] caused [Plaintiff's] depression and anxiety." (Def.'s Mot. Summ. J., Ex. J., ECF No. 34-11, at 8.)

Defendant's argument that Plaintiff waited for almost a year to amend is not persuasive. Where, as here, Defendant failed to raise the issue and completed discovery as if the emotional distress damages were in play, Plaintiff is justifiably excused for failing to amend her complaint at an earlier date. Additionally, in its Motion for Summary Judgment, Defendant addressed Plaintiff's claims for future damages and emotional distress damages on the merits, relegating its deficient pleadings argument to two short footnotes. Although Defendant asserts that Plaintiff's failure to amend her complaint lacks good cause, the Court finds that the precise reason Plaintiff moved to amend was that Defendant raised the absence of emotional distress allegations for the first time at the summary judgment stage. Plaintiff filed her Motion less than three weeks after

Defendant first raised the issue. The Court finds that Plaintiff's Motion was a diligent effort to cure her complaint of a defect raised by Defendant after summary judgment motions had been filed and that Plaintiff has demonstrated good cause.

As to the Rule 15(a)(2) inquiry, the Fourth Circuit has held that "[d]enying leave to amend is appropriate when at least one of three circumstances exists: (1) 'the amendment would be prejudicial to the opposing party;' (2) 'there has been bad faith on the part of the moving party;' or (3) 'the amendment would have been futile.'" *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 121 (4th Cir. 2013) (quoting *Laber v. Harvey*, 438 F.3d 404, 426–27 (4th Cir. 2006)). "Delay alone, however, without any specifically resulting prejudice, or any obvious design by dilatoriness to harass the opponent, should not suffice as reason for denial [of leave to amend]." *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir. 1980). Here, Defendant has focused solely on the bad-faith and futility rationales, arguing that Plaintiff failed to notify Defendant at any time that she was seeking future damages and that the future damages claims are futile because they are not recoverable on claims for breach of contract and bad faith. As the Court has recently ruled that future damages are unavailable as a matter of law, Defendant's arguments are persuasive on that point. However, Plaintiff's proposed amendments also cover emotional distress damages. Defendant has presented no argument as to those damages. The Court finds no evidence of bad faith, futility, or specific prejudice to Defendant. Accordingly, the Court grants Plaintiff leave to amend because justice so requires.

However, the Court notes that the amended complaint is not to be used to shoehorn additional claims or causes of action. Although not explicitly stated in Rule 15(a)(2), district courts may condition leave to amend on the fulfillment of reasonable requirements. 6 Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 1486 (3d ed. 1998); *see also United States v.*

Woods, No. 5:07-cv-187-BR, 2008 WL 2115130, at *4 (E.D.N.C. May 16, 2008) (granting leave to assert facially viable defenses, but denying leave to assert an inadequately pled counterclaim and other defenses that were irrelevant); *Spampinato v. M. Breger & Co.*, 176 F. Supp. 149, 151 (E.D.N.Y. 1958) (permitting amendment of complaint on condition that plaintiff withdraw from proposed amended complaint thirty-four paragraphs concerning previously adjudicated claims), *aff'd on other grounds*, 270 F.2d 46 (2d Cir. 1959). Accordingly, the Court grants Plaintiff's Motion on the condition that, within fourteen days of this order, she file an amended complaint that omits any claims for future damages in accordance with the Court's prior order.

CONCLUSION

For the foregoing reasons, it is **ORDERED** that Plaintiff's Motion to Amend is **GRANTED IN PART** and **DENIED IN PART**. The Plaintiff shall file an amended complaint that specifically alleges emotional distress damages in accordance with Rule 9(g). However, Plaintiff shall remove all references to future damages in accordance with the Court's prior Order.

AND IT IS SO ORDERED.

PATRICK MICHAEL DUFFY
United States District Judge

December 29, 2015
Charleston, South Carolina